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No. _____

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY BATTLE,
Petitioner,
vs.
STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Petitioner Thomas Henry Battle was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the murder of eighty-year-old Birdie Johnson. The facts relating to this offense are fully set out in the opinion of the Supreme Court of Missouri affirming petitioner's conviction and sentence, State v. Battle, 661 S.W.2d 487, 488-489 (Mo. banc 1983), and will not be restated here.

The facts and circumstances bearing upon petitioner's present claims are as follows:

A. Venireman Exclusion Claim

Petitioner made no attempt prior to trial or during voir dire to allege that the exclusion of persons who could never under any circumstances consider imposing a sentence of death violated his right to a jury selected from a fair cross-section of the community; the first such claim was advanced after his conviction, in his Motion for New Trial. As a result, no evidence was ever presented by petitioner to support his claim. On appeal, this contention was rejected by the Missouri Supreme Court. State v. Battle, supra at 491-492.

B. Suppression of Statement Claim

Prior to trial, petitioner filed a motion to suppress the various oral, tape-recorded and videotaped statements he had given to police in which he had confessed to the murder (Petitioner's Appendix, hereinafter "Pet.App.," E-4). An extensive evidentiary hearing was held on this motion, in which the police officers who questioned petitioner testified that he had repeatedly been advised of and explicitly waived his Miranda rights, including the right to counsel, while petitioner claimed that he had asked for and been denied an attorney. See State v. Battle, supra at 489-490 for a

summary of the state's evidence. The trial court, while granting the motion to suppress as to some collateral statements, credited the State's evidence as to two particular confessions and denied the motion to suppress as to them. Id. at 489-491. The Missouri Supreme Court adopted the trial court's conclusion as to credibility. Id. at 491.

ARGUMENT

A. The Attack Upon Witherspoon

What petitioner disingenuously describes as a "misinterpretation" by the Missouri Supreme Court of Witherspoon v. Illinois, 391 U.S. 510 (1968) is in fact his attempt to claim that the doctrine enunciated by this Court in Witherspoon and subsequent cases is "unconstitutional" as violating the right to selection of a jury from a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). In Witherspoon, this Court explicitly recognized the principle that a venireman can constitutionally be excused for cause if (1) he could not consider imposing a sentence of death regardless of the evidence introduced; or (2) his attitude toward capital punishment would prevent him from making a fair and impartial determination as to guilt. Id. at 522 (n. 21). This same principle has been restated on subsequent occasions by this Court. Lockett v. Ohio, 438 U.S. 586 (1978); Adams v. Texas, 448 U.S. 38 (1980). Indeed, the identical "fair cross-section" theory advanced by petitioner has been rejected in this Court's past decisions:

"Nothing in Taylor . . . suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." Lockett v. Ohio, supra at 596-597.

See also Adams v. Texas, supra at 50; Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311, 313-314, 78 L.Ed.2d 43 (1983).

Petitioner's creative attempt to overrule the Witherspoon doctrine sub silentio by citation of the Taylor line of fair cross-section cases cannot withstand the above-quoted language.

Until recently, the notion that "Witherspooning" a jury panel violated fair cross-section principles had been rejected out of hand by every state and federal court which had ever considered the question. See, e.g., Smith v. Balkcom, 660 F.2d 573, 582-583 (5th Cir. 1961), modified 671 F.2d 858

(1982), cert. denied __ U.S. __, 103 S.Ct. 181 (1983); People v. Free, 94 Ill.2d 378, 447 NE 2d 218, 229 (1983); State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315, 1319 (1983); State v. Stokes, 637 S.W.2d 715, 722 (Mo. banc 1982), cert. denied __ U.S. __, 103 S.Ct. 1263 (1983); Harrell v. State, 249 Ga. 48, 288 SE 2d 192, 195 (1982). Within the past year, however, two federal district judges have seen fit to ignore the language of Lockett and Adams, and numerous other legal principles, in an attempt to overrule the Witherspoon doctrine on this ground. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), appeal pending sub nom Mabry v. Grigsby, No. 83-2113-EA (8th Cir banc); Keeten v. Garrison, No. C-C-77-193-M (W.D.N.C., January 12, 1984). These rulings are, or soon will be, before their respective Circuit Courts of Appeal. The time may have come when it is appropriate to lay the present theory to rest once and for all. United States Supreme Court Rule 17.1.

B. The Allegedly Coerced Confessions

The frivolous and dilatory character of petitioner's remaining claim in this petition is evident from the fact that it rests upon an issue of fact, not law. At the evidentiary hearing on petitioner's motion to suppress statements, petitioner claimed that his confessional statements were taken despite requests for an attorney, and the police officer witnesses testified that petitioner repeatedly waived his right to counsel and never asked for an attorney. See State v. Battle, supra at 489-491, in which the state's evidence on this issue is set out in detail. As to the two statements introduced at trial, the trial court necessarily concluded that petitioner had indeed waived his Miranda rights. Id. at 491. The evidence supporting the trial court's conclusion, set out in the Battle opinion, is either flatly ignored or misstated in petitioner's "Statement of the Case." Obviously,

it was for the state courts to resolve this factual dispute, see Sumner v. Mata, 449 U.S. 539 (1981), and petitioner cannot relitigate the state court's finding of fact by means of a certiorari petition.

CONCLUSION

In view of the foregoing, the respondent submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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